No. 22555

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK RAY CULBERTSON,

Petitioner and Appellant,

vs.

STATE OF CALIFORNIA, et al.,

Respondents and Appellees.

On Appeal From the United States District Court
For the Southern District of California

APPELLANT'S REPLY BRIEF

HARRY ELLMAN and
MELVYN B. STEIN
Suite 1811
110 West C Street
San Diego, California 92101

Attorneys for Petitioner and Appellant.

SUBJECT INDEX

		Page
STATEMENT OF THE CASE		1
ARGUMENT		2
I	THE DISTRICT COURT ERRED IN DISMISSING THE PETITION ON THE GROUNDS THAT THE WRIT WAS FILED IN A CIVIL PROCEEDING OR BECAUSE PETITIONER WAS NO LONGER IN STATE CUSTODY.	2
II	THE WRIT OF HABEAS CORPUS SHOULD HAVE BEEN GRANTED EITHER ON THE LAW IN EXISTENCE AT THE TIME THE ORIGINAL WRIT WAS FILED OR UNDER REDRUP V. NEW YORK	4
CONCLUSION		4
CERTIFICATION		5

TABLE OF AUTHORITIES CITED

CASES

Fay v. Noia, 372 U.S. 391	3
Fiswick v. United States, 329 U.S. 211	3
Jacobellis v. Ohio, 378 U.S. 184	4
Parker v. Ellis (1960) 362 U.S. 574, 4 L. Ed. 2d 963	3
Redrup v. New York, 386 U.S. 767	1, 4
Rivenburgh v. Utah (1962) 299 F. 2d 842	2
Roth v. United States, 354 U.S. 476	4
United States v. Morgan (1954) 346 U.S. 502, 98 L. Ed. 248	2, 3

CODES

Code of Federal Procedure, Rule 60 (b)	1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK RAY CULBERTSON,

Petitioner and Appellant,

vs.

STATE OF CALIFORNIA, et al.,

Respondents and Appellees.

APPELLANT'S REPLY BRIEF

STATEMENT OF THE CASE

The facts on this appeal are set forth in Appellant's Opening Brief. Appellant replies to the points made by respondents with respect to the dismissal of the Writ in the Court below upon the ground that the present Writ is a "civil" proceeding and is therefore barred by Rule 60 (b) of the Code of Federal Procedure and because Appellant was not in State custody at the time the present Writ was filed. Respondents also contend that the decision of the United States Supreme Court in Redrup v. New York, 386 U. S. 767 is not retroactive.

Appellant previously filed a Writ of Habeas Corpus at the time he was serving a probationary term, in the case at bench.

ARGUMENT

I

THE DISTRICT COURT ERRED IN DISMISSING THE PETITION ON THE GROUNDS THAT THE WRIT WAS FILED IN A CIVIL PROCEEDING OR BECAUSE PETITIONER WAS NO LONGER IN STATE CUSTODY

Respondents contend that the case of United States v. Morgan (1954) 346 U. S. 502, 98 L. Ed. 248 is authority for the principal that a Writ of Error Coram Nobis is not a proper device for a review of a State conviction by the Federal Courts. In that case petitioner filed a Coram Nobis Writ in the Federal Court after he was convicted by a New York court on a State charge. The sentence in the State court was made longer as a result of his previous conviction on a federal charge. At the time of the filing of the Writ of Coram Nobis he had served his sentence on the federal offense. He was, however, still incarcerated in a State prison. The United States District Court had dismissed the Writ on the ground that it had no jurisdiction as applicant was no longer in custody under the Federal sentence.

In the case at bench, appellant had filed a petition for a Writ of Habeas Corpus within his probationary period.

Respondents cite the case of Rivenburgh v. Utah (1962) 299 F. 2d 842, 843, in support of their claim that Coram Nobis cannot be used to support a collateral attack on a State judgment. Appellant is not doing this in the case at bench, Further the Rivenburgh case, supra, dealt with a claim that applicant should be granted a new trial because of newly discovered evidence. In the case at bench, no such contention is made, but rather, that the United States District Court erred in dismissing the Writ of Habeas Corpus.

Respondents cite the case of Parker v. Ellis (1960) 362 U. S. 574, 4 L. Ed. 2d 963 in which the United States Supreme Court dismissed a Writ of Certiorari because petitioner had been released from State Imprisonment before the case could be heard. In the case at bench, however, appellant is not attacking State proceedings but rather the validity of the denial of the Writ of Habeas Corpus which was filed at a time when he was still in custody. Moreover appellant is subject to additional punishment as a recidivist under the provisions of the Penal Code of California, making subsequent convictions for the same offense a felony. Under the Morgan decision, although petitioner's probationary term has expired, the Court has jurisdiction where the results of a conviction may persist and subsequent convitions carry heavier penalties and where his civil rights, as in the case of a convicted felon, may be affected. Fiswick v. United States, 329 U. S. 211.

The real issue on this appeal is whether appellant in the case at bench still has a remedy even though he did not appeal from the previous denial of the Writ of Habeas Corpus.

Appellant is frank to admit that he seeks appellate review by a new Writ although his time to appeal has expired because he has been denied constitutional rights of fundamental character and technical objections should not be permitted to deny him these rights. Fay v. Noia, 372 U. S. 391

II

THE WRIT OF HABEAS CORPUS SHOULD HAVE BEEN GRANTED EITHER ON THE LAW IN EXISTENCE AT THE TIME THE ORIGINAL WRIT WAS FILED OR UNDER REDRUP V. NEW YORK

Respondents go to great pains to argue whether the case of Redrup v. New York, 386 U. S. 767 should be applied retrospectively. Appellant contends that this is immaterial since the Writ should have been granted on the authority of Roth v. United States, 354 U. S. 476 and Jacobellis v. Ohio, 378 U. S. 184.

In further answer to the contention of respondents, the present appeal is not moot because the result of appellant's conviction persists as pointed out in the previous paragraph.

In none of the cases cited by respondents on page 12 of their brief is there a Statute which makes a repetition of the offense subject to the penalty of a felony with resultant loss of civil rights.

CONCLUSION

In view of the foregoing, appellant prays that the order of the United States District Court dismissing the Writ of Error Coram Nobis be reversed.

Respectfully submitted,

HARRY ELLMAN and
MELVYN B. STEIN

By: /s/ HARRY ELLMAN

Attorneys for Petitioner and Appellant.

CERTIFICATION

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

/s/ HARRY ELLMAN